Supreme Court, U.S.
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No. 93-573

In The

Supreme Court of the United States

October Term, 1993

DENNIS WESTFALL,

Petitioner,

versus

SOUTHWEST AIRLINES CO.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals correctly affirmed the District Court's order granting summary judgment to Respondent on the grounds Petitioner had not submitted sufficient sworn admissible evidence that would convince a reasonable jury the articulated reason for Petitioner's termination was simply a pretext for age or retaliation discrimination?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. Dennis Westfall, Petitioner

2. Southwest Airlines Co.[1], Respondent

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[1] Pursuant to Sup.Ct.R. 29.1, Respondent informs the Court that it has no parent companies or subsidiaries.

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STATEMENT OF THE CASE[2]

Petitioner Mr. Westfall was promoted to the position of station manager of Respondent Southwest Airlines' New Orleans station on July 14, 1986. The decision to promote him was made by Mr. Jim Wimberly, Southwest's Vice President of Ground Operations and Provisioning. (R. Vol. 1, p. 132, Affidavit of Jim Wimberly). At the time of his promotion, Mr. Westfall was 39 years old (R. Vol. 1, p. 72, Affidavit of Leroy Carroll). The same person who approved his appointment to the position in 1986, when he was 39 years old, approved the decision to terminate him on February 11, 1991, when he was 43 years old. (R. Vol. 1, pp. 77-78, Affidavit of Leroy Carroll; R. Vol. 1, p. 135, Affidavit of Jim Wimberly; R. Vol. 1, p. 40, Nos. 1, 2, 3, 46, Defendant's Statement of Uncontested Material Facts).

In the position of station manager, Mr. Westfall was responsible for all of Southwest's ground operations at the New Orleans airport. Southwest's ground operations are divided into three departments: operations department; ramp department; and customer service department. (R. Vol. 1, p. 72, Affidavit of Leroy Carroll; R. Vol. 1, pp. 40-41, Nos. 4, 5, Defendant's Statement of Uncontested Material Facts).

The operations department is responsible for dispatching flights, loading fuel, performing weight and

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[2] Because Respondent Southwest Airlines Co. ("Southwest") takes issue with Petitioner's presentation of the facts of this case, Respondent sets forth the "Statement of Facts" in order to preserve its right to contest Petitioner's version. See Sup.Ct.R. 15.1.

balance calculations on the aircraft, and completing dispatch reports. The ramp department is responsible for accepting luggage, deciding the bin placement of the luggage aboard the plane, and loading and unloading of freight and baggage on aircraft, pushing the plane back for departure, and flagging in the aircraft upon arrival. The customer service department is responsible for ticketing, checking passengers in at the gate, completion of sales reports, and handling air freight. (R. Vol. 1, pp. 72-73, Affidavit of Leroy Carroll; R. Vol. 1, p. 41, Nos. 6, 7, 8, Defendant's Statement of Uncontested Material Facts).

A very important part of the Southwest company culture is to continually stress an upbeat, high morale, team effort attitude by the employees. (R. Vol. 1, p. 73, Affidavit of Leroy Carroll; R. Vol. 1, p. 41, No. 9, Defendant's Statement of Uncontested Material Facts). At his deposition, Mr. Westfall acknowledged this was very important.

> Q. Would you agree with me that someone in a position of station manager who does not have the respect of the employees and the supervisor is not an appropriate or capable manager? Don't you think that a manager has to have the respect of the people in order to manage?
>
> A. Yes, sir.
>
> Q. And in the Southwest Airlines culture, wouldn't you agree that leadership by the station manager is terribly important?
>
> A. Yes, sir.
>
> Q. And morale is terribly important?

A. Yes, sir.

Q. They have a Southwest Airlines way of doing things, don't they?

A. Yes, sir.

Q. And it is an upbeat, positive work-together type of culture, isn't it?

A. Yes, sir.

Q. And if you are a station manager of a group of people and you have not been successful in causing that culture to continue or to exist, you failed, haven't you?

A. Yes, sir.

(R. Vol. 1, pp. 114-117, Petitioner's deposition excerpts, pp. 270-271).

In October 1989, when Leroy Carroll was appointed Southwest's Regional Director of Ground Operations, he reviewed the performance evaluations and audit reports for all of the stations under his supervision, including the New Orleans station. The audit reports consist of standard reviews of each station, performed by Southwest's audit department once a year. The performance evaluations are standard reviews of each station manager's performance and are usually completed once each year. The prior performance evaluations of Dennis Westfall were completed by another Regional Director of Ground Operations, Phil Gilbert, who supervised New Orleans prior to Leroy Carroll's assignment as a Regional Director. (R. Vol. 1, p. 73, Affidavit of Leroy Carroll; R. Vol. 1, pp. 41-42, Nos. 10, 11, 12, 13, Defendant's Statement of Uncontested Material Facts).

Leroy Carroll's 1989 review of the prior audits raised a question in his mind about the level of concern the New Orleans station manager had about his station. For example, the 1987 audit revealed that some equipment had not been painted or repaired and that there were broken telephones, doors, and formica around various counters. Additionally, ticket lists were inaccurate, lost and found forms were not completed, and there were errors in the refund drafts. (R. Vol. 1, p. 73, Affidavit of Leroy Carroll; R. Vol. 1, p. 42, No. 15, Defendant's Statement of Uncontested Material Facts).

The question about the level of concern by Mr. Westfall as station manager was also reflected in some of the comments on Mr. Westfall's prior performance evaluations. For example, on his December 16, 1988 Performance Evaluation, Phil Gilbert rated Dennis Westfall "below satisfactory" in the category dealing with maintaining effective control over company resources and monitoring expenditures. (R. Vol. 1, pp. 80-85, Affidavit of Leroy Carroll). This evaluation stated, "[t]he most recent audit revealed some glaring deficiencies in monitoring and correcting these deficiencies." Further, with respect to his leadership, the 1988 evaluation stated, "[w]ithout applying a 'whip cracking style,' would recommend Dennis display a more aggressive management style, particularly when personnel fail to provide quality service in all respects." (R. Vol. 1, pp. 80-85, Affidavit of Leroy Carroll; R. Vol. 1, p. 42, No. 18, Defendant's Statement of Uncontested Material Facts).

Mr. Westfall acknowledged at his deposition that Mr. Gilbert had reviewed the performance evaluation with

him and he agreed with Mr. Gilbert's conclusions concerning his performance problems. (R. Vol. 1, p. 43, No. 19, Defendant's Statement of Uncontested Material Facts).

Q. Referring to the first page of the appraisal under Paragraph 4 where it states their rating you concerning "Maintain effective control over company resources, monitor expenditures to ensure compliance with budgetary guidelines. Accomplish goals established locally and systemwide." And in the column over on the right under Rating, it's rated you a 2.9; is that correct?

A. Yes, sir.

Q. And a 2.9 is not satisfactory; isn't that correct?

A. Yes, sir.

Q. If you refer to the third page of the appraisal under Paragraph 4, it has a narrative. Is it your understanding that that narrative describes why you received the rating of 2.9?

A. Yes, sir.

Q. And the rating says, "The most recent station audit revealed some glaring deficiencies in monitoring and correcting these deficiencies." Do you agree with that?

A. Yes, sir.

Q. Referring to the second page of the Performance Appraisal at the top under Paragraph 2, it says, "What are the main areas needing improvement?" And it has the statement, "Needs to display more aggressive management style where performance

of employees is substandard." Do you remember that?

A. Yes, sir.

Q. Do you remember Mr. Gilbert discussing that with you?

A. Yes, sir.

Q. What do you remember Mr. Gilbert telling you about that?

A. That I should pay special attention to employees that are having problems, and the problem employees, that I should pay more attention to them, and that, you know, try to improve their performance or stay on top of what they're doing and be aware of what their performance is.

Q. Well, did he talk to you about the problems that you were having that caused him to put that on your Performance Appraisal?

A. I don't remember that being directed at any specific employee or specific problem.

Q. Did you agree with that statement on your appraisal?

A. Yes, sir.

Q. Referring to the !ast page of the appraisal in Paragraph 2, Mr. Gilbert stated, and I quote, "Without applying a 'whip cracking style,' would recommend Dennis display a more aggressive management style, particularly when personnel fail to provide quality service in all respects." Do you agree with that statement?

A. Yes, sir.

Additionally, when Mr. Carroll took over the New Orleans station in October 1989, the previous Regional Director of Ground Operations, Phil Gilbert, told him Mr. Westfall appeared to be lazy and that it would be wise "to monitor him closely," and that he was absent from his office on many occasions when he should not have been. (R. Vol. 2, pp. 410-411).

When Mr. Carroll met with Mr. Westfall shortly after Mr. Carroll became Director of Ground Operations in October 1989, Mr. Westfall represented that everything was fine and that he had no problems. However, during subsequent trips to the New Orleans station, Mr. Carroll sensed that there were some morale problems there because of complaints he was receiving from some of the supervisors under Dennis Westfall. (R. Vol. 1, p. 74A, Affidavit of Leroy Carroll; R. Vol. 1, p. 43, Nos. 20, 21, Defendant's Statement of Uncontested Material Facts).

When Mr. Carroll completed the performance evaluation of Mr. Westfall on January 11, 1990, he noted that Mr. Westfall, "[c]ould be more aggressive in approach to 'problem' employees"; that he "[s]hould improve follow up with employees in their problem areas"; and that, "[t]he most recent station audit, October 24, 1989 indicated improvement, however there remain some areas of concern in documentation of bag reports, weight and balance forms involving air freight, and recording of negotiable documents." Mr. Carroll discussed and reviewed this performance evaluation with Mr. Westfall on January 11, 1990. (R. Vol. 1, pp. 74-75, Affidavit of Leroy Carroll; R. Vol. 1, p. 43, No. 23, 24, Defendant's Statement of Uncontested Material Facts).

During his deposition, Petitioner acknowledged that he was deficient as indicated by Mr. Carroll on the 1990 performance evaluation. (R. Vol. 1, p. 44, No. 25, Defendant's Statement of Uncontested Material Facts).

Q. Referring to Page 3 of the appraisal on Paragraph 1, it's stated that "Dennis understands and applies basic principles of leadership. Could be more aggressive in approach to 'problem' employees." Mr. Carroll talked to you about that?

A. Yes, he did.

Q. What did he tell you about that?

A. Basically, that I should monitor the problem employees and be more aggressive in applying disciplinary procedures and documentation and stuff like that.

Q. Paragraph 2, Mr. Carroll stated "Should improve follow up with employees in their problem areas." Did you agree with that?

A. Yes, sir.

* * *

Q. You had heard from prior managers, Mr. Gilbert, essentially the same thing, had you not?

A. Yes, sir.

Q. So would it be correct at this time that you understood that you continued to have a problem in this area?

A. Yes, sir.

On March 25, 1990, there was a serious incident at the New Orleans station during which a provisioning stand

punctured the outer metal skin of one of Southwest's multimillion dollar aircraft, because there was no bumper on the stand and it had a bad wheel. Because of the resulting damage, it was necessary to cancel the flight and take the aircraft out of service for repairs. When Mr. Carroll was notified of the incident, he thought it reflected very badly on Mr. Westfall, and that a concerned and diligent station manager would have observed the condition of the stand and immediately taken steps to correct the situation. (R. Vol. 1, p. 75, Affidavit of Leroy Carroll; R. Vol. 1, p. 133, Affidavit of Jim Wimberly; R. Vol. 1, p. 44, Nos. 26, 27, Defendant's Statement of Uncontested Material Facts). Mr. Carroll then wrote Mr. Westfall a memorandum dated March 28, 1990 (R. Vol. 1, pp. 86-87, Affidavit of Leroy Carroll), which stated:

> This has been an accident waiting to happen and is one of the major items that Station Management and Supervisors are in place to prevent. I find it inexcusable that a piece of equipment that comes into contact with an aircraft and is used daily to have exposed metal at the aircraft contact point.

During November 1990, Mr. Carroll received a telephone call from one of the New Orleans ramp supervisors, John McGrath, asking for a meeting with him. Mr. McGrath had worked for Southwest Airlines since Southwest first began operations in New Orleans in 1979. (R. Vol. 1, p. 75, Affidavit of Leroy Carroll; R. Vol. 1, p. 44, No. 29, Defendant's Statement of Uncontested Material Facts).

On November 27, 1990, Mr. McGrath met with Mr. Carroll and separately with Mr. Jim Wimberly, Southwest's Vice President of Ground Operations and Provisioning. Mr. McGrath told them the Southwest employees in New Orleans felt they were being lied to, that Mr. Westfall did not have the respect of many of the employees, and further that when he was told about problems, he often would not see them through until they were solved. Mr. McGrath also said that Mr. Westfall was not effectively exercising control over the supervisors. (R. Vol. 1, pp. 52-56, Affidavit of John McGrath; R. Vol. 1, pp. 70-79, Affidavit of Leroy Carroll; R. Vol. 1, p. 134, Affidavit of Jim Wimberly; R. Vol. 1, p. 45, No. 30, Defendant's Statement of Uncontested Material Facts). Other employees and supervisors in the ramp department have confirmed that most of the employees had no respect for Mr. Westfall, and routinely referred to him as the "invisible manager" and "Mr. Mustfall." They referred to him as the "invisible manager" because he could rarely be found. Telephone calls would come in for Mr. Westfall in the operations department and frequently he was nowhere to be found. Further, he had no rapport with the employees in ramp and operations, and typically would not even say hello to them when he came to the department to pick up his mail. (R. Vol. 1, pp. 52-69, Affidavits of John McGrath, Kurt Schellhaas, Peter Alongia, Brian Plaisance and Ronnie Malinosky).

Additionally, on November 29, 1990, Mr. Carroll received a telephone call from one of the operations agents who had also been employed at the New Orleans station from the beginning, Pam Gendusa, about problems at the New Orleans station. Ms. Gendusa followed

the telephone call with four letters describing a number of serious complaints about supervision at the New Orleans station, including the Petitioner, and representing that morale among the station employees was very low. (R. Vol. 1, pp. 76, 88-98, Affidavit of Leroy Carroll; R. Vol. 1, p. 46, No. 34, Defendant's Statement of Uncontested Material Facts). In one of the letters, Ms. Gendusa states: "Dennis and Tom are successfully destroying my attitude and diminishing my spirit . . . . I have been threatened by my Station Manager several times for taking my legitimate problems to a higher authority." (R. Vol. 1, p. 89, Memo to Leroy Carroll from Pam Gendusa). In another memorandum, Ms. Gendusa states: "Station morale, not Company morale is very low here and it shows in the employees. A negative atmosphere was brought on to employees by local management. Local management shows no leadership or concern to work with the employees." (R. Vol. 1, p. 92, Memo to Leroy Carroll from Pam Gendusa). In another memorandum, Ms. Gendusa states: "This four hour class which is instructed by Employee Development is *OPTIONAL*. I was told it was mandatory and involuntarily scheduled by Tom and Dennis with no reason given . . . . When I informed Dennis that this class was volutary [sic], his response was, 'I made it mandatory.' Blatant harassment." (R. Vol. 1, p. 97, Memo to Leroy Carroll from Pam Gendusa). The memorandum goes on to say: "Dennis has a problem with where I live. He is constantly harassing me for my address. I willingly give it to him. This address also happens to coincide with where my company mail and tax returns are sent as well as my driver's license and luggage tags. I can satisfy the State of LA and the U.S.

Government, but not Dennis." (R. Vol. 1, p. 98, Memo to Leroy Carroll from Pam Gendusa).

A few days later, Ms. Gendusa filed a charge with the EEOC alleging sex discrimination with respect to her evaluation, and intimidation and harassment. (R. Vol. 1, pp. 99-100, Affidavit of Leroy Carroll; R. Vol. 1, p. 46, No. 35, Defendant's Statement of Uncontested Material Facts).

In accordance with Southwest's normal procedures, Mr. Carroll forwarded the EEOC charge to Mr. Westfall to investigate. Petitioner testified that at the same time Mr. Carroll wanted him to investigate a number of other problems concerning the operations at the New Orleans station, including complaints that a supervisor had made very derogatory remarks about the company; a supervisor had left work to get bait for a fishing trip; some allegations about stolen company property; a supervisor's refusal to work overtime; and misuse of sick leave by employees. (R. Vol. 2, pp. 373-382, Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit G).

According to Petitioner's testimony offered by Petitioner in the record below, Mr. Westfall first spoke to Mr. Carroll about his investigation during a meeting on December 11, 1990. Petitioner claims he was fired for his statements to Mr. Carroll in this meeting and the subsequent written report dated January 10, 1991, which he sent to Mr. Carroll. His testimony concerning that meeting was as follows:

> Q. What did you tell him? Do you remember what you told him about the validity of her complaints?

A. Basically, what I put in the letter responding to – in reference to that that most of her complaints were not valid, and we went over those item by item.

Q. You didn't think her complaints were valid?

A. No, sir.

Q. Did you think some of them were valid?

A. At the time that I reviewed this, I didn't have all the information then that I had later in reference to her situation.

Q. I want you to tell me at this time what you told him.

A. Based on that time, as far as I knew then, close to all of her accusations were not true.

Q. So you told Mr. Carroll, as far as you were concerned, none of her allegations were true?

A. Excluding one. I believe we discussed the job performance or the appraisal situation in reference to her job performance where it was noted that she was substandard in her job performance, and I'm not sure – If I could look at that letter there that I responded to Mr. Carroll, I could probably refresh my memory.

Q. Sure.

A. (Witness reviewing.) Yeah, we did. I believe – Let me read this again.

Q. You did what?

A. Let me read this again. This letter was issued January the 10th, so this letter had

> not been issued when I went to meet with Mr. Carroll on December the 11th.

(R. Vol. 2, pp. 388-389, Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit J).

On or about January 10, 1991, Mr. Carroll received a written report from Mr. Westfall stating that:

> Generally, there was no validity to the majority of her complaints. From my investigation and interviews with all of the Operations personnel, the only real discrepancy was the actual performance appraisal. Tom indicated that Training Coordinator, Frank Davino, agreed with the Job Performance part of her appraisal and in my interview with Frank, he did not agree with the Job Performance issue, but he would not comment on the attitude portion of the evaluation. (R. Vol. 1, p. 102, Memo to Leroy Carroll from Dennis Westfall).

In the remainder of the memorandum and the attached point by point response to Ms. Gendusa's complaints, Petitioner concluded that fifteen points of Ms. Gendusa were without merit, and that one sexual harassing comment was made, but was made by a different person. (R. Vol. 1, pp. 104-105, Memo to Leroy Carroll from Dennis Westfall).

On December 14, 1990, Mr. Carroll went to New Orleans and met with all of the supervisors and Mr. Westfall in an attempt to straighten out the situation. In view of the lack of management and leadership by Mr. Westfall, and the serious morale problems at the station,

Mr. Carroll had serious concerns about keeping Mr. Westfall as the station manager. (R. Vol. 1, pp. 76-77, Affidavit of Leroy Carroll).

After this meeting with the supervisors, Mr. Carroll also met separately with Mr. Westfall on December 14, 1990, and told him that the situation at the station was unacceptable, and emphasized the serious nature of the problems at the station. During the meeting with Mr. Westfall, Mr. Carroll told him that whatever he felt he needed to do at the station, he should do quickly. (R. Vol. 1, p. 77, Affidavit of Leroy Carroll). In testimony submitted by the Petitioner, the Assistant Station Manager Nona Rogers testified that Mr. Carroll told them on December 14th: "You've got a serious morale problem, you have to find out what's going on. Fix it, I mean that's just a gist of it." (R. Vol 2, pp. 399-400, Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit P). Ms. Rogers went on to testify:

> Q. Okay. Did he indicate to you what would happen if things were not corrected in your meeting with Mr. Carroll and Mr. Westfall?
>
> A. That people would be terminated if the problems weren't solved.
>
> * * *
>
> Q. Were you confused about why you might lose your job at that point?
>
> A. No, there were obviously serious problems in the station.

(R. Vol. 2, pp. 399-400, Plaintiff's Opposition To Defendant's Motion for Summary Judgment, Exhibit P).[3]

On or about January 3, 1991, Mr. Carroll received another memorandum from Pam Gendusa discussing problems with the station and with Mr. Westfall. (R. Vol. 1, p. 107, Memo to Leroy Carroll from Pam Gendusa).

In early February 1991, after discussions with both Mr. Jim Wimberly, Vice-President of Ground Operations and Provisioning, and Ms. Ann Rhoades, Vice-President of Personnel, Mr. Carroll evaluated the situation again and concluded that the problems at the New Orleans station had progressed beyond the point at which they

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[3] Under Petitioner's theory of the case, Mr. Carroll visited the station on December 14, 1990, and told Petitioner he felt there were serious problems at the station, and that people would be terminated if the problems were not solved, simply as a coverup for Mr. Carroll's real motive; i.e., that he was so upset with Petitioner's preliminary verbal findings concerning the Gendusa EEOC charge that he wanted to terminate him. However, according to Petitioner's own testimony, the principal thrust at that time, if not the entire thrust of Petitioner's preliminary report was that Ms. Gendusa's complaints were *not* true. (See Appellee's Brief, pp. 18-19). In his deposition, Petitioner couldn't remember with certainty whether he even mentioned the job performance issue to Mr. Carroll. He certainly did not remember delivering a message to Mr. Carroll that he had uncovered widespread serious EEOC violations. Indeed, even in his later written findings given to Mr. Carroll on or about January 10, 1991, Petitioner did not find that Ms. Gendusa had been discriminated against because of her sex by the job evaluation. He simply found that the training coordinator agreed with the job performance part of the evaluation, but not the attitude portion. (R. Vol. 2, pp. 388-389, Plaintiff's Opposition to Defendant's Motion For Summary Judgment, Exhibit J, discussed at Appellee's Brief, p. 20).

could be corrected. (R. Vol. 1, p. 77, Affidavit of Leroy Carroll).

In view of Mr. Westfall's serious deficiencies as a station manager, Mr. Wimberly and Mr. Carroll did not feel comfortable that Petitioner could adequately function as a station manager or supervisor in any capacity. Further, because they had concluded that Mr. Westfall did not have the high level of concern for Southwest's operations as they would expect of anyone working for the airline, they did not feel he should be retained in any capacity. (R. Vol. 1, pp. 78-79, Affidavit of Leroy Carroll).

On February 11, 1991, Mr. Carroll met with Mr. Westfall and advised him that he was being terminated because the station was not operating in an acceptable manner, and that supervisors and employees had lost respect for him. Mr. Westfall's age and his participation or findings in the investigation of the EEOC charge by Pam Gendusa were not in any way a consideration in Mr. Carroll's decision to terminate Mr. Westfall. (R. Vol. 1, p. 77, Affidavit of Leroy Carroll; R. Vol. 1, p. 47, Nos. 44, 45, Defendant's Statement of Uncontested Material Facts).

On February 14, 1991, Mr. Westfall wrote a letter to Jim Wimberly asking for a meeting to review his termination. (R. Vol. 1, pp. 77-78, 108-109, Affidavit of Leroy Carroll; R. Vol. 1, p. 135, Affidavit of Jim Wimberly). Pursuant to his request, on March 7, 1991, Mr. Westfall met with Leroy Carroll, Jim Wimberly, and Ann Rhoades for the purpose of reviewing the decision to terminate him. The Assistant Station Manager, Nona Rogers, and prior Director of Ground Operations, Phil Gilbert, were also present. (R. Vol. 1, p. 78, Affidavit of Leroy Carroll;

R. Vol. 1, p. 135, Affidavit of Jim Wimberly; R. Vol. 1, p. 48, No. 48, Defendant's Statement of Uncontested Material Facts).

After the meeting, Mr. Wimberly, Ms. Rhoades and Mr. Carroll concluded that the decision to terminate Mr. Westfall was a proper decision in view of his lack of management leadership, and the unacceptable morale problems at the New Orleans station. Mr. Westfall's age and his participation or findings in connection with the investigation of the EEOC charge by Pam Gendusa had nothing whatsoever to do with the decision to uphold the termination of Mr. Westfall. (R. Vol. 1, p. 78, Affidavit of Leroy Carroll; R. Vol. 1, p. 135, Affidavit of Jim Wimberly; R. Vol. 1, pp. 154-155, Affidavit of Ann Rhoades; R. Vol. 1, pp. 48-49, No. 50, Defendant's Statement of Uncontested Material Facts).

At the time of Mr. Westfall's termination, the station managers for the seven stations Mr. Carroll supervised as Regional Director of Ground Operations in February 1991, and their respective ages were:

1. Roy Mayo, Corpus Christi, age 56;
2. Rudy Lopez, El Paso, age 35;
3. Chuck Vanzant, Harlingen, age 33;
4. Randy Rickard, Houston Hobby, age 46;
5. Jones Dunnavant, Houston Intercontinental, age 62;
6. Dennis Westfall, New Orleans, age 43;
7. Carl Warrell, San Antonio, age 63.

(R. Vol. 1, p. 78, Affidavit of Leroy Carroll; R. Vol. 1, p. 48, No. 47, Defendant's Statement of Uncontested Material Facts). Southwest did not demote Dennis Westfall to another management or non-management position within Southwest because of his serious inability to manage and failure to correct problems with Southwest's operations at New Orleans, indicating he could not satisfactorily function in another operations or supervisory position at Southwest, nor as a station manager at Southwest at any future time. (R. Vol. 1, pp. 78-79, Affidavit of Leroy Carroll; R. Vol. 1, p. 49, No. 51, Defendant's Statement of Uncontested Material Facts).

SUMMARY OF THE ARGUMENT

Petitioner has failed to show any special or important reasons why this Court should grant his Petition.

The holdings of the District Court and the Fifth Circuit Court of Appeals were correct.

There is no dispute over the elements of proof and the burden of proof applicable to Petitioner's claims. Nor is there any dispute that Respondent Southwest Airlines presented sworn admissible testimony in support of its Motion for Summary Judgment that Petitioner was terminated because he was not providing the kind of leadership and management Southwest Airlines expects of its station managers, and that Petitioner failed to present sworn admissible evidence that these reasons were simply a pretext for discrimination.

ARGUMENT

THE DECISION BELOW WAS CORRECT

1. The Retaliation Claim

When asked at his deposition whether he had any facts or evidence to support his claim that his termination was retaliation for his participation in the investigation and his findings, Petitioner had no facts or evidence. (R. Vol. 1, pp. 192-198A). In his brief to the Court of Appeals, Petitioner's principal arguments in support of his retaliation claim were first that he was doing fine as a station manager; second, he was discharged a few weeks after he uncovered evidence substantiating two significant sexual harassment and sexual discrimination complaints by Ms. Gendusa; and third, other station managers had comparable problems and were not fired.

With respect to the first point, Petitioner offered affidavits from two employees, Ms. Frey and Mr. Aleman. Ms. Frey worked as a Southwest ticket agent in the customer service department, prior to resigning in June 1991. Accordingly, she was not in a position and did not represent she was in a position to describe the problems in the ramp and operations departments of Southwest's New Orleans station. As set forth in the affidavit of Mr. Carroll, his concern focused on the serious problems in the ramp and operations departments. Mr. Aleman's affidavit, at best, is simply a lukewarm endorsement of the Petitioner from the view point of one employee. Even Mr. Aleman states that, "Under Dennis Westfall, he considered morale to be average, although there were some people who would complain about anything" and that "he did hear some ramp and operations agents call him

the "invisible manager." (R. Vol. 2, pp. 433-435, Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit DD). This affidavit does not in any sense reasonably permit a conclusion that Mr. Carroll was not concerned about the problems at the New Orleans station or that he was not very concerned about Petitioner's failure to provide the type of management and leadership Southwest Airlines expects of it station managers. From the time Mr. Carroll became the Director of Ground Operations in October 1989, he had received a number of negative reports concerning Petitioner. Some of his concerns about Petitioner's performance were specifically noted in Petitioner's performance evaluations, and Petitioner acknowledges that he had management deficiencies. Nor is there any dispute that in the latter part of 1990, Mr. Carroll was informed of more very serious management deficiencies by a long term supervisor, Mr. McGrath, and a long term employee, Ms. Gendusa, and that he made a special trip to New Orleans to look into the problems at Southwest's New Orleans station and meet with the management employees. Nor is there any dispute that at that meeting he told Petitioner he was very concerned about the problems and if the problems were not solved, Petitioner would be terminated.

With respect to the second point, it is not only absurd but illogical to conclude that Mr. Carroll would think badly about Petitioner, much less get so angry that he would terminate him, simply and only because Petitioner's investigation of Ms. Gendusa's EEOC charge showed that two of her fifteen allegations had some merit. Mr. Carroll had asked Petitioner to investigate the EEOC charge. There would be no reason to assume that

Mr. Carroll did not want Petitioner to do a good and thorough job of investigating the charge. There would be no reason to assume and no evidence that Mr. Carroll did not want Petitioner to accurately report back to him his findings. After all, Ms. Gendusa's charge was not going to disappear, nor were Ms. Gendusa or the EEOC going to go away without an investigation and possible litigation simply because Petitioner, as the station manager, reported back to Mr. Carroll that her allegations were without merit. Petitioner even testified that when he reported his findings to Mr. Carroll, Mr. Carroll was not even upset. (R. Vol. 1, p. 198, Petitioner's deposition excerpts, p. 300). Without evidence that Mr. Carroll's motivation for the termination was because of Petitioner's investigatory findings, Petitioner's attempt to infer a retaliation motivation simply because Petitioner was terminated a few weeks later wholly lacks any merit and ignores the reasons for Petitioner's termination as an ineffective station manager. This is particularly true in this case, where Petitioner's deficiencies as a manager had been documented long before his investigation of the EEOC charge and the seriousness of his deficiencies had been emphasized by Mr. Carroll, two months before his termination.

With respect to the third point, Petitioner has failed to produce admissible evidence that other similarly situated station managers who were supervised by Mr. Carroll had substantially similar management and leadership deficiencies and morale problems at their stations.

Based on this record, the District Court and Court of Appeals were correct in finding Petitioner has not carried his burden of establishing that Southwest's articulated

reason for Petitioner's termination was simply a pretext for alleged retaliation discrimination.

2. The Age Discrimination Claim

Petitioner argues he was discharged because he was 43 years old. Petitioner proposes that the Vice President of Ground Operations, Mr. Jim Wimberly, promoted him to the position of station manager when he was 39 years old, and then in February 1991, because Petitioner was four years older, terminated Petitioner because he was then 43 years old. This proffered theory of Petitioner's, on its face, is absurd, and becomes even more so, when it is considered that of the six other station managers under Mr. Carroll's supervision, four were older than the Petitioner.

In any event, it is undisputed that the Regional Director of Ground Operations, Mr. Leroy Carroll, and the Vice President of Ground Operations, Mr. Jim Wimberly, had been informed about serious management and morale problems at the New Orleans station. It is also undisputed that a very important part of the Southwest Airlines' culture and business philosophy is to continually stress an upbeat, high morale, team effort attitude by the employees. Under the circumstances, the decision to terminate Mr. Westfall for these substantial business reasons clearly refutes any claim that his termination was because of his age, and substantiates that the lower court decision dismissing his claim was correct.

CONCLUSION

It is respectfully submitted that in attacking and alleging error in the lower court's review of the record in this case, Petitioner has failed to sustain its burden of establishing under Sup.Ct.R. 10 that there are special and important reasons the writ should be granted. The decision below does not conflict with applicable decisions of this Court or of another Court of Appeals. The Fifth Circuit Court of Appeals correctly decided that Petitioner's claims should be dismissed per curium.

Respectfully submitted,

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